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No. 09-____

IN THE

Supreme Court of the United States

FORTINO COBAIN BUENO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

* Counsel of Record *Counsel for Petitioner*

WILSON-EPES PRINTING CO., INC – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

The Court's splintered decision in *United States* v. *Santos*, 128 S. Ct. 2020 (2008) has created an intractable split in the circuits regarding the definition of "proceeds" of unlawful activity under the federal money laundering statute, 18 U.S.C. § 1956(a)(1) (2006). The question presented is:

Whether, in light of the Court's decision in *Santos* and the rule of lenity, the language of Section 1956(a)(1) must be interpreted uniformly, such that "proceeds" means "profits" regardless of the factual circumstances of a particular case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fortino Cobain Bueno ("Bueno") respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The published opinion of the Fifth Circuit is available at 585 F.3d 847 (5th Cir. 2009) and is reproduced at page 1a of the Appendix to this petition ("App."). The unpublished judgment of the district court is reproduced at App. 17a.

JURISDICTION

The judgment of the court below was entered on November 15, 2009. App. 1a. The court denied a

timely filed petition for rehearing en banc on December 9, 2009. App. 29a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The text of the relevant statute, 18 U.S.C. § 1956 (2006), is set forth at App. 31a.

INTRODUCTION

This case asks the Court to answer a question that has divided the lower courts in the wake of *United States* v. *Santos*, 128 S. Ct. 2020 (2008). The Court's splintered decision in *Santos* held that the term "proceeds" in the federal money laundering statute, 18 U.S.C. § 1956(a)(1) (2006), is ambiguous and that, under the rule of lenity, the term means "profits" rather than "receipts" in a case involving proceeds of illegal gambling. But the lower courts are intractably split in their application of the statute to other predicate unlawful offenses, such as the drug trafficking allegation at issue here.

The Court should grant certiorari to bring certainty to the law, and to rectify the Fifth Circuit's departure from this Court's precedents. Calling the holding below "nonsensical," App. 13a, Judge DeMoss objected to the Fifth Circuit's "narrow reading" of *Santos* in the controlled substances context, *id.* at 12a, and "lodge[d] [his] concern that our Circuit has misapplied Supreme Court precedent at arriving at this state of affairs." *Id.* at 7a. As he explained, the Fifth Circuit's ruling contravenes precedents of this Court by failing to recognize that an ambiguous term in a criminal statute must be interpreted uniformly in the defendants' favor, regardless of the factual circumstances of a particular case. *Id.* at 14a.

In *Clark* v. *Martinez*, 543 U.S. 371, 386 (2005), the Court declined to "establish within our jurisprudence * * * the dangerous principle that judges can give the same statutory text different meanings in different cases." Yet the lower courts have implemented this same "dangerous principle" by interpreting Section 1956(a)(1) differently depending on the factual context. Consistent with *Clark*, seven Justices joined opinions in *Santos* that concluded that the statute's meaning could not change depending on the facts of a case. *See* 128 S. Ct. at 2031 (plurality); *id.* at 2036 (Alito, J., dissenting). Given that the Court has now held that the ambiguous term "proceeds" means profits in one factual context, that same term must be interpreted consistently in other cases, whether under the rule in *Clark* or the rule of lenity that was the basis for the holding in *Santos*.

The question is dispositive of this case, because the Government has conceded that it presented no proof that the funds at issue constituted profits of unlawful activity. And the question is one of great national importance, notwithstanding that the statute has been amended as to future prosecutions. As the government itself noted in *Santos*, the issue is of "[r]ecurring [i]mportance." Pet. for Cert. 26, *United States* v. *Santos*, No. 06-1005, and this is evidenced by the flood of cases considering the issue post-*Santos*. There are hundreds, if not thousands, of pre-amendment cases where the issue will arise on direct appeal or—as in *Santos* itself—on collateral review. It is intolerable that some of these defendants in identical circumstances will continue to go free while others, like Bueno, will languish in prison, depending solely on where their prosecutions

happened to commence. And the overarching question—whether an ambiguous term in a criminal statute may be interpreted differently depending on the factual context—will have wide-ranging consequences far beyond the specific statutory context of this case.

STATEMENT OF THE CASE

1. Statement of the Facts.

Bueno is a Californian who ran a gardening business and bought and sold trucks and cars on the side, sometimes flying about the country to pick up the automobiles. R315, 398-99, 424-25, 427-28.[1] He was asked to go to North Carolina to pick up, register and insure a car, and to drive it to California. R425-28, 431. Bueno flew to North Carolina and after waiting days for the car to be repaired was awakened in the night to find others putting packs of money into it. R432, 480-81. He protested against transporting the money, R432, 443, 483, but the others threatened to kill him and his family if he did not. R432.

On March 20 or 21, 2006, Bueno started back to California in the car. R443, 488. He was stopped for speeding in Texas. R305-06. The officer searched his car, finding money in compartments in vacuum-sealed packages. R321. Bueno—with no attorney and hindered by a poor command of English—was then questioned by the officer and a detective. R359-61; Ex. 3 (video played at trial).

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[1] The record in the Fifth Circuit is cited as "R," followed by the page number, *e.g.*, R1. Record Excerpts in the Fifth Circuit are cited as "RE." The Government's exhibits admitted at trial are cited as "Ex."

A fruitless follow-up investigation ensued. Police learned nothing about the individuals with whom Bueno stayed at the North Carolina address. R351, 377, 402. And they learned nothing about the identity of the individual(s) whom Bueno was supposed to meet upon return to California.

2. District Court Proceedings.

In 2006, the Government filed a complaint in the Northern District of Texas, alleging conspiracy under 18 U.S.C. § 1956(h). RE2. That statute provides that "any person who conspires to commit any offense defined in this section * * * shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h) (App. 42a).

The offense defined under Section 1956 was "promotional" money laundering under 18 U.S.C. § 1956(a)(1)(A)(i). That statute provides criminal penalties for anyone who, "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity" and does so "with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. § 1956(a)(1)(A)(i) (2006).[2]

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[2] Effective May 20, 2009, 18 U.S.C. § 1956(c)(9) now reads: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (2009). This new definition of a criminal prohibition does not (and under the Ex Post Facto clause could not) apply retroactively to this case. *See* Art. I, § 9, cl. 3; *Bouie* v. *City of Columbia*, 378 U.S. 347, 354 (1964) (fundamental principle that criminal law must have

The indictment alleged that Bueno had knowingly conducted a financial transaction with the intent to promote the "specified unlawful activity" of "trafficking of controlled substances" in violation of 21 U.S.C. § 846 and 841(a)(1). R34. Bueno was not charged, however, with that underlying activity. Bueno pled not guilty. R64. The district court later rejected a plea agreement after determining Bueno had a duress defense, and set the trial for the next morning. R224-27, RE4-5.

At trial, the Government relied on the post-arrest interview to attempt to prove that Bueno knew the money came from sales of illegal drugs. R376. It also relied on the testimony of Agent Rick Nuckles that Bueno's methods of transporting money fit the profile of individuals who transport drug money westward across the United States. R409-415.[3] Agent Nuckles ruled out the likelihood that the money in Bueno's car was "profits" of unlawful activity by testifying that when drug money is transported toward the south, "the money is basically the *gross revenue* that's going back to the smuggler. The smuggler is going to probably reinvest it in another load of drugs coming into the United States. Also, he's got to cover all of his expenses as far as hiring drivers, purchasing vehicles, that sort of thing." R415 (emphasis added). The government "did not present additional evidence

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existed when conduct occurred "must apply to bar retroactive criminal prohibitions emanating from courts as well as from legislatures"); App. 11a (DeMoss, J., concurring).

[3] Agent Nuckles is the same expert whose testimony the Court found inadequate to show concealment money laundering in *Cuellar* v. *United States*, 128 S. Ct. 1994 (2008), which was decided the same day as *Santos*.

about the nature of the alleged drug trafficking operation, the origin of the cash, or Bueno's knowledge of whether the funds were gross receipts or profits." App. 8a (DeMoss, J., concurring).

At the time of trial, *Santos* had not yet been decided. Bueno testified at trial that he acted under duress, and the District Court submitted the duress defense to the jury. R489, 491; RE12.[4] A jury found Bueno guilty, RE11, and he was sentenced to 94 months in prison. RE12, 13. Bueno filed a timely notice of appeal to the Fifth Circuit. R151; RE14.

3. The Fifth Circuit's Decision. On October 15, 2009, the panel entered a judgment and published opinion affirming the conviction. *United States* v. *Bueno*, 585 F.3d 847 (5th Cir. 2009) (App. A). Reviewing for plain error,[5] the panel concluded

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[4] The panel's opinion incorrectly states, with respect to Bueno's testimony that he transported money under death threats to him and his family, that Bueno "at no point before [his testimony at trial] had made such a claim." App. 3a. Bueno first indicated his concern about his family's safety in the post-arrest interview. Ex. 3 at 27:12-24. Bueno also raised the issue at his pre-trial plea hearing, and the district court denied Bueno's plea and sent the case to trial based on the plea-hearing testimony. R224-27.

[5] Bueno preserved, by a Fed. R. Crim. P. 29 motion for acquittal, objections to the sufficiency of the evidence of "proceeds," though he did not object specifically that the term should be defined as "profits." R107, 122, 417, 499-500. As Judge DeMoss noted, "Bueno did not have the clairvoyance to argue in his Rule 29 motion that the government failed to prove the money was the profits of a drug operation, as opposed to gross receipts, because the *Santos* decision had not then been handed down." App. 9a. In the Fifth Circuit, both Bueno and the Government *agreed* that *de novo* review was appropriate, *see* Appellant's Br. at iv, 17; Appellee's Br. 18-19, until the Government argued otherwise just two days prior to oral

that it was bound by *United States* v. *Fernandez*, 593 F.3d 303, 315-16 (5th Cir. 2009), another case reviewed under the plain error standard that, in the panel's view, raised "exactly the same issue: whether the district court committed plain error when it did not require the government to show drug profits, as opposed to receipts, in its case alleging promotional money laundering and conspiracy to do the same." App. 5a.

Following *Fernandez*, the panel held that, because of its uncertainty regarding the precedential effect of the *Santos* decision, "the uncertainty renders any error here not 'plain.'" *Id.* (citing *Fernandez*, 593 F.3d at 316). The panel also rejected Bueno's alternative arguments regarding the sufficiency of the evidence of Bueno's "intent to promote" laundering and conspiracy to do so, App. 5a-6a, and the basis for his sentence. *Id.* at. 6a-7a.

Filing a special concurrence, Judge DeMoss "reluctantly" joined the panel's result, *id.* at 15a, acknowledging that he was bound by prior panel decisions to vote with the majority. But he objected to the Fifth Circuit's "narrow reading" of *Santos* in the controlled substances context, *id.* at 13a, and wrote separately "to lodge [his] concern that our Circuit has misapplied Supreme Court precedent at arriving at this state of affairs." *Id.* at 7a.

Judge DeMoss found the Fifth Circuit's rule—that "while statutory ambiguity favors the accused per the rule of lenity, ambiguity in subsequent case law

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argument. Contrary to its own precedent, *United States* v. *Menesses*, 962 F.2d 420, 426 (5th Cir. 1992), the panel below held that the standard of review could never be waived, and applied the plain error standard.

prevents the convicted from showing plain error"—to be "nonsensical." *Id.* at 12a-13a. *Santos*, explained Judge DeMoss, holds that the term "proceeds" in Section 1956 is ambiguous, and therefore "our interpretation must be guided by the rule of lenity in *all* money laundering prosecutions." *Id.* at 14a (emphasis added). Given the holding in *Santos*, he "would grant Bueno the benefit of a very considerable doubt, and hold that the rule of lenity obliges us to define 'proceeds' as 'profits' in this case." *Id.*

Judge DeMoss also found that the error affected Bueno's substantial rights and "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 15a. Stressing that "the gulf between the elements of § 1956(a)(1) and the proof adduced at trial is vast," App. 15a, he distinguished this case from others where the error was inconsequential because "there is no evidence whatsoever that the money was profits, nor that Bueno * * * knew that the money represented drug-trafficking profits." *Id.* at 14a. Noting that this Court "saw it fit in *Santos* to vacate on collateral review a conviction which had been final for nearly a decade," Judge DeMoss concluded that "if the Supreme Court saw it fit to apply the rule of lenity and to vacate *Santos*'s long-final conviction, we should not hesitate to grant relief on direct appeal." *Id.* at 15a-16a. He thus stated that "[i]f I could, I would vacate the conviction and remand to the district court for retrial." *Id.* at 16a.

The Fifth Circuit denied Bueno's timely petition for rehearing and rehearing en banc. *Id.* at 29a.

REASONS FOR GRANTING THE WRIT

I. DIVERGENT VIEWS OF *SANTOS* PRECEDENTIAL VALUE HAVE LED THE CIRCUITS TO DIVERGENT INTERPRETATIONS OF THE STATUTE.

A. The Court's Fractured Decision In *Santos*.

As it applies to this case, the federal money laundering statute provides criminal penalties for anyone who, "knowing that the property involved in a financial transaction represents the *proceeds* of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the *proceeds* of specified unlawful activity," with the intent to promote the specified unlawful activity. 18 U.S.C. § 1956(a)(1)(A)(i) (2006) (emphases added). In *Santos*, a majority of the Court held that the statutory term "proceeds" is ambiguous and that, under the rule of lenity, that term must be interpreted in favor of a criminal defendant to mean "profits" rather than simply "receipts"—at least on the facts of that case, which involved the receipts of an illegal gambling activity. *Santos*, 128 S. Ct. at 2025 (plurality); *id.* at 2033-34 (Stevens, J., concurring).

But as Judge DeMoss noted below, "[w]hile the Court's disposition is easily summarized, its vote was fractured, giving lower courts scant guidance for future applications," App. 10a, a concern echoed by numerous courts. *See infra* at 13. In *Santos*, a four-member plurality concluded that the term "proceeds" was ambiguous. 128 S. Ct. at 2023-24. Dictionaries defined "proceeds" to mean either "profits" or "receipts," *id.* at 2023, the context left the term ambiguous, and the statute was coherent under

either meaning. *Id.* at 2024. Therefore, "the tie must go to the defendant" because "[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *Id.* at 2024-25. The plurality accordingly found that the statutory term "proceeds" means "profits" in all cases.

Justice Stevens provided the fifth vote to affirm. He agreed that the rule of lenity applied in the context of that case, noting that the plurality's conclusion "dovetails with what common sense and the rule of lenity would require." *Id.* at 2033. But in his view, the Court need not "pick a single definition of 'proceeds' applicable to every unlawful activity." *Id.* Drawing on legislative history, Justice Stevens concluded, in dicta, that "Congress intended the term 'proceeds' to include gross revenues from the sale of contraband and the operation of organized crime syndicates involving such sales." *Id.* at 2032. But that legislative history "sheds no light on how to identify the proceeds of many other types of specified unlawful activities," including the illegal gambling context presented by the *Santos* case. *Id.* Justice Stevens also noted that applying a "gross receipts" definition of "proceeds" to Santos' gambling operation created a "merger" problem by imposing a far lengthier prison sentence for money laundering than for the underlying gambling offense itself. *Id.* at 2032-33. He therefore concluded that the rule of lenity required the Government to prove laundered funds were "profits" in Santos' case. *Id.* at 2033-34.

Notably, however, *seven* Justices rejected Justice Stevens' view that the definition of "proceeds" could vary with the underlying offense. Three members of the plurality described Justice Stevens' position as

"original with him" and having "no precedent in our cases." *Id.* at 2030.[6] The Court has never engaged in the "interpretative contortion" of "giving the same word, in the same statutory provision, different meanings in different factual contexts." *Id.* And the Court "forcefully rejected," *id.*, that position in *Clark* v. *Martinez*, 543 U.S. at 386, which declined to endorse the "dangerous principle that judges can give the same statutory text different meanings in different cases." Noting an "obligation to maintain the consistent meaning of words in statutory text," *Santos*, 128 S. Ct. at 2030, the plurality would continue to define "proceeds" as "profits" in *all* contexts.

The four dissenters likewise rejected Justice Stevens' opinion "insofar as it holds that the meaning of the term 'proceeds' varies depending on the nature of the illegal activity that produces the laundered funds." *Id.* at 2036 (Alito, J, dissenting). But the dissenters were of the view that the statute was not ambiguous, and that the term "proceeds" meant gross receipts in all contexts. *Id.*

Accordingly, as Justices Scalia, Souter and Ginsburg noted, Justice Stevens' "speculations" on how the statute would apply in the drug trafficking context were dicta and "form no part of [the] holding." *Id.* at 2031. Therefore, counsel "remain free to argue" Justice Stevens' position, but "should be warned" that "[n]ot only do the Justices joining [the plurality] opinion reject that view, but so also (apparently) do the Justices joining the principal dissent." *Id.* The dissenters neither endorsed nor disagreed with this view of the *stare decisis* effect of

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[6] Justice Thomas did not join this portion of the opinion.

Santos, but did speculate that—based on their rejected view of the statute as unambiguous—that both they and Justice Stevens, if unconstrained by precedent, would have interpreted "proceeds" as meaning gross receipts in a case involving drug trafficking allegations. *See id.* at 2035-36 & n.1.

B. The Circuits Are Divided As To The Effect Of *Santos* In Cases Involving Other Factual Circumstances.

Santos thus delivered fractured opinions on both the interpretation of the statute and the import of the Court's fractured views. As the Ninth Circuit has noted, "[i]n light of this two-tier disarray, appellate courts have struggled to glean what, if any, new rule of law the divergent opinions of the *Santos* Court established." *United States* v. *Van Alstyne*, 584 F.3d 803, 811 (9th Cir. 2009); *see also id.* at 812 (noting "difficulty courts have encountered in turning the splintered *Santos* opinions into an intelligible rule of law"); Evan Ennis, *An Uncertain Precedent:* United States v. Santos *and the Possibility of a Legislative Remedy*, 95 Cornell L. Rev. 191, 218 (2009) ("In the wake of *Santos*, lower courts are now applying divergent interpretations of the case."); *United States* v. *Brown*, 553 F.3d 768, 783 (5th Cir. 2008) ("the precedential value of *Santos* is unclear outside of the narrow factual setting of that case, and the decision raises as many issues as it resolves for the lower courts"), *cert. denied sub nom. Combs* v. *United States*, 129 S. Ct. 2812 (2009). As a result, the circuits that have addressed the post-*Santos* definition of "proceeds" under the applicable language of 18 U.S.C. § 1956(a)(1) have employed at

least four sharply conflicting approaches that arrive at very different results.[7]

The Third and Seventh circuits, recognizing the import of the Court's five-Justice holding that the term "proceeds" is ambiguous and the rule of lenity therefore applies, have held that "proceeds" means "profits" in other applications of the statute, without confining that holding to the illegal gambling context. In *United States* v. *Yusuf*, 536 F.3d 178, 185 (3d Cir. 2008), *cert. denied*, 129 S. Ct. 2764 (2009), which involved the laundering of proceeds of mail fraud, the Third Circuit held that *Santos* overruled its own circuit precedent that had defined "proceeds" as "gross receipts," and broadly held that "proceeds" applies to all "criminal profits" derived from specified unlawful activity. *See id.* at 186 n.12; *cf. United States* v. *Grasso*, 381 F.3d 160, 169 (3d Cir. 2004). The Seventh Circuit has also required the Government to prove that laundered money was "profits" of unlawful activity beyond the gambling context. *See United States* v. *Lee*, 558 F.3d 638, 643 (7th Cir. 2009) (the "regular expenses that are essential" to prostitution operation are not "proceeds," thus requiring proof of "profits"); *United States* v. *Hodge*, 558 F.3d 630, 632-33 (7th Cir. 2009) (evidence of "rent and utilities" paid from proceeds of prostitution ring insufficient to support conviction).[8]

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[7] The definition of "proceeds" after *Santos* has not yet been addressed by Second, Tenth, and D.C. Circuits.

[8] Under a variety of rationales, several district courts have also held that *Santos* requires proof of "profits" and refused to narrow the holding only to illegal gambling. *See, e.g., United States* v. *Bohuchot*, No. 3:07-CR-167-L, 2008 WL 4849324, *4 (N.D. Tex. 2008) ("The court first considers the application of *Santos* and determines * * * that the term 'proceeds' in the

By contrast, the Eighth and Eleventh circuits—ignoring the *stare decisis* rationale of the three-Justice *Santos* plurality—have treated Justice Stevens' concurrence (including its dicta) as the Court's holding, defining "proceeds" as "profits" only in the illegal gambling context, and employing a gross-receipts definition in other contexts. In *United States* v. *Demarest*, 570 F.3d 1232 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 421 (2009), the court held that "[t]he narrow holding in *Santos*, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds,'" and affirmed a conviction based on gross-receipts evidence in the drug trafficking context. *Demarest*, 570 F.3d at 1242. As the Ninth Circuit has noted, in *Demarest* "the Eleventh Circuit took the opposite view" from that of the Third Circuit in *Yusuf*. *See Van Alstyne*, 584 F.3d at 811.

The Eighth Circuit recently reached the same conclusion in *United States* v. *Spencer*, 592 F.3d 866 (8th Cir. 2010), stating that "[o]ther circuits hold—and this court agrees—that *Santos* does not apply in the drug context." *Id.* at 879. The Fourth Circuit

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money laundering claim requires a showing of 'profits.'"); *United States* v. *Hedlund*, No. CR. CR-06-346-DJL, 2008 WL 4183958, *6 (N.D. Cal. 2008) (proceeds means "profits" for all specified unlawful activities because *Clark* v. *Martinez* forbids giving a word different meanings in different applications of the same statute); *United States* v. *Baker*, No. 06-CR-20663, 2008 WL 4056998, *2-4 (E.D. Mich. 2008) (rejecting Government's argument that *Santos*' definition applies only to illegal gambling cases); *United States* v. *Thompson*, No. 3:06-CR-123, 2008 WL 2514090, *1-2 (E.D. Tenn. 2008) (in prosecution for theft and money laundering "[t]he Government will have to prove at trial whether all or some part of the monies * * * paid to [Defendant] were profits.").

has also adopted this view in an unpublished disposition. *See United States* v. *Howard*, 309 Fed. App'x 760, 771, 2009 WL 205649, *10 (4th Cir. 2008) ("*Santos* does not establish a binding precedent that the term 'proceeds' means 'profits'" except regarding an illegal gambling charge); *see also United States* v. *Darui*, 614 F. Supp. 2d 25, 30 (D.D.C. 2009) ("*Santos* defines 'proceeds' as 'profits' only in the context of an illegal gambling operation"); *United States* v. *Orosco*, 575 F. Supp. 2d 1214, 1218 (D. Colo. 2008).[9]

The Sixth and Ninth Circuits have attempted to stake out a middle ground by limiting the "profits" interpretation only to cases where the money laundering statute presents the "merger" problem identified by Justice Stevens. In *United States* v. *Kratt*, 579 F.3d 558 (6th Cir. 2009), the Sixth Circuit held that under *Santos* "proceeds" "means 'profits' when the predicate Section 1956 offense creates a merger problem that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase." *Id.* at 562. The Ninth Circuit followed *Kratt*, holding that "[w]e * * * view the holding that commanded five votes in *Santos* as being that 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger' problem of the kind that troubled the

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[9] This was the interpretation of the statute urged by the Government below. While the panel based its holding on the conclusion that there was no plain error, App. 5a, it effectively adopted this interpretation, stating that "[t]his case involves a conspiracy to launder proceeds of an illegal narcotics operation, *a distinction that makes a difference.*" App. 4a (emphasis added). As explained below, if the Fifth Circuit had found that *Santos* dictated the same interpretation of the statute in this case, the court could not have reached the conclusion it did.

plurality and concurrence in *Santos*." *Van Alstyne*, 584 F.3d at 814. *Cf. United States* v. *García-Pastrana*, 584 F.3d, 351, 380 (1st Cir. 2009) (indicating agreement but not reaching issue).

Finally, the Fifth Circuit has taken its own tack. As it did in this case, the Fifth Circuit applies plain-error review to convictions that raise the "proceeds" definition under Section 1956(a)(1) in the drug trafficking context, and simply holds that the "uncertainty [of *Santos*] renders any error here not 'plain.'" App. 5a.[10] Applying that principle, the court has affirmed money laundering convictions where it found sufficient evidence of "profits," even assuming that definition applied.[11] But as Judge DeMoss recognized below, that rationale does not suffice in this case, because the Government *conceded* that it "did not present evidence that those funds constituted 'profits' of the drug operation." Gov't 5th Cir. Br. 19. *See also* App. 15a (DeMoss, J., concurring) ("the gulf between the elements of § 1956(a)(1) and the proof adduced at trial is vast").

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[10] *See also Fernandez*, 559 F.3d 303, 316 (5th Cir. 2009); *United States* v. *Cooks*, 589 F.3d 173, 182 (5th Cir. 2009); *United States* v. *Gonzalez*, 331 Fed. App'x. 289, 290 (5th Cir. 2009).

[11] *See Brown*, 553 F.3d at 784 (court "need not decide these thorny issues" raised by *Santos* because there was "ample, unchallenged evidence that the sales were profitable"); *Fernandez*, 559 F.3d at 315-316 (no "plain error" but also finding ample evidence of "profits" in the alternative); *United States* v. *Redd*, No. 06-60806, 2009 WL 348831, *9 (5th Cir. 2009) (noting "ample evidence that Starsky's drug trafficking was profitable"); *United States* v. *Achobe*, 560 F.3d 259, 269 (5th Cir. 2008) ("even if the more stringent definition of 'proceeds' in the statute applies, the proof adduced by the government in this case * * * is sufficient").

Thus, the Fifth Circuit's interpretive approach conflicts with that of the other circuits, even though, like the defendant in *Santos* itself, Bueno "did not have the clairvoyance" to specifically argue the profits definition at trial given that *Santos* had not yet been decided. App. 9a (DeMoss, J., concurring). *See Santos*, 128 S. Ct. at 2023 ("profits" argument raised for the first time on collateral review based on intervening decision of the Seventh Circuit). If, as Bueno argues, the Court's holding in *Santos* necessarily requires that the ambiguous term "proceeds" be interpreted consistently to mean profits in all other cases, then the error must be recognized here, where the government conceded that it presented no evidence of any profits. *See* App. 14a-15a (DeMoss, J., concurring).

Accordingly, the circuits are hopelessly divided on the interpretation of the statute outside of the illegal gambling context considered in *Santos*. Some circuits hold, correctly, that the statute must be given the same interpretation in all cases and that convictions cannot be sustained in the absence of evidence of profits from the underlying illegal activity. By contrast, other circuits—including the Fifth Circuit—uphold convictions notwithstanding the absence of such evidence. The Court should therefore grant certiorari to restore uniformity to the administration of criminal justice.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS.

The source of the error in the court below—and in other circuits that have failed to adopt the "profits" definition—is a failure to follow this Court's precedents. Even though *Santos* was a splintered decision, the Court held through a five-Justice majority

that, in a case involving illegal gambling, the rule of lenity requires that the ambiguous term "proceeds" be interpreted in defendants' favor to mean "profits". *See* 128 S. Ct. at 2025 (plurality) ("proceeds" is ambiguous and "the tie must go to the defendant" under the rule of lenity); *id.* at 2033 (Stevens, J., concurring) (plurality's conclusion in gambling context "dovetails with what common sense and the rule of lenity would require"). This decision is now binding precedent. As seven Justices recognized in *Santos*, the Court's settled jurisprudence mandates that the same statutory term be interpreted consistently in all other cases, including this one, regardless of their factual context. *Id.* at 2030-31 (plurality); *id.* at 2036 (Alito, J., dissenting).

This result is dictated by the Court's decision in *Clark*. There, the statute at issue applied to three categories of aliens and provided that anyone in those categories "may be detained beyond the removal period." 8 U.S.C. § 1231(a)(6) (1994 ed., Supp. V). The Court had previously determined in *Zadvydas* v. *Davis*, 533 U.S. 678, 697-99 (2001) that the statute's use of "may" was ambiguous and, in light of the "constitutional doubt" axiom, must be interpreted to authorize detention of aliens in the second category only as long as reasonably necessary to remove them. In *Clark*, the Court held that the *Zadvydas* interpretation must also govern the first category of aliens because the operative, but ambiguous, statutory language applied without differentiation to all three categories of aliens that are its subject. To give these same words a different meaning for each category "would be to invent a statute rather than interpret one." 543 U.S. at 378. The Court thus rejected "the dangerous principle

that judges can give the same statutory text different meanings in different cases." *Id.* at 386.

The Court held further that even if the constitutional concerns that arose in *Zadvydas* did not arise in *Clark*, "it cannot justify giving the *same* detention provision a different meaning when such aliens are involved." *Id.* at 380 (emphasis in original). Having been established, the interpretation given to the statutory term governed all cases "whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81. Changing the interpretation of the statute depending on whether it raised constitutional concerns in a particular factual setting "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Id.* at 382. In short, "[t]he lowest common denominator, as it were, *must* govern." *Id.* at 380 (emphasis added). The canon thus leaves no discretion for a lower court to interpret the statute otherwise in a future case.[12]

This case is to *Santos* as *Clark* was to *Zadvydas*. In *Santos*, the Court held that the statutory term "proceeds" is ambiguous and that the rule of lenity required that the term be defined as "profits" in that

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[12] *See* Jonathan R. Siegel, *The Polymorphic Principle and the Judicial Role in Statutory Interpretation*, 84 Tex. L. Rev. 339, 339 (2005) (describing "lowest common denominator" canon as "unusually powerful" tool for addressing statutory ambiguity, creating a rule of statutory construction that "is so strong that it must always apply; courts lack power to deviate from it"); Gilbert Lee, *How Many Avoidance Canons Are There After* Clark v. Martinez*?*, 10 U. Pa. J. Const. L. 193, 220 (2008) (same).

case. As in *Zadvydas*, this holding was necessary to avoid the constitutional doubt arising from an ambiguous criminal statute.[13] The "profits" definition thereby became the "lowest common denominator" of the statute, and, under *Clark*, neither this Court nor the lower courts have any discretion to interpret the same statutory term differently in a future case depending on its particular facts. *See, e.g.*, *Hedlund*, 2008 WL 4183958, at *6 (following *Clark* to define "proceeds" as "profits" in drug trafficking context).

Indeed, the ground for interpreting the statute consistently is even stronger in this case than it was in *Clark*. Unlike *Clark*, which did not raise the same constitutional doubt concerns as *Zadvydas*, the rule of lenity applies equally in both *Santos* and this case. The "obligation to maintain the consistent meaning of words in statutory text does not disappear when the rule of lenity is involved * * *. If anything, the rule of lenity is an additional reason to remain consistent, lest those subject to the criminal law be misled." *Santos*, 128 S. Ct. at 2030 (plurality) (citation omitted). With a criminal statute, a court cannot simply engage in "filling in the gaps," *id.* at 2031 (Stevens, J., concurring), because federal criminal laws must be written by Congress. *United States* v. *Hudson*, 11 U.S. (7 Cr.) 32, 34 (1812).

The rule of lenity is thus an additional reason why the holding of *Santos* requires the same result in this

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[13] *See Dunn* v. *United States*, 442 U.S. 100, 112 (1979) (rule of lenity is "rooted in fundamental principles of due process"); *United States* v. *Lanier*, 520 U.S. 259, 265 (1997); *Bouie*, 378 U.S. at 350-51 (due process requires that a criminal statute "give fair warning of the conduct that it makes a crime"); *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.).

case. "[T]he touchstone of the rule of lenity is statutory ambiguity." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). The Court, through a five-Justice majority, held in *Santos* that the rule of lenity applies to the statute at issue because the statutory term "proceeds" is ambiguous. That holding must govern here as well, because this case involves the same statutory language. That this case arises on different facts cannot result in a different interpretation of the same language. Accordingly, just as was held in *Santos*, the term must be interpreted in favor of Bueno in this case as well.

It is immaterial that four Justices disagreed with the holding of *Santos* and would have held that the statutory term "proceeds" is unambiguous. Now that the Court itself has held to the contrary, that decision is binding precedent and, under both *Clark* and the rule of lenity, the same interpretation of the ambiguous language must be adopted in all future cases. As noted, seven Justices in *Santos* agreed with that fundamental point. Similarly, there were also dissenters in *Zadvydas*, but they nonetheless recognized in *Clark* that the *Zadvydas* interpretation must govern in future cases.[14]

It is likewise immaterial that Justice Stevens, in dicta, indicated that he might have interpreted the term "proceeds" differently in a case like this one, involving drug trafficking allegations. "Justice

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[14] Two of the *Zadvydas* dissenters also dissented in *Clark*, in part because of their view that *Zadvydas* should be overruled. *See Clark*, 543 U.S. at 728 (Thomas, J., dissenting). *See also Spector* v. *Norwegian Cruise Line, Ltd.*, 545 U.S. 119, 141 (2005) (recognizing that *Clark* provides a "canon for choosing among plausible meanings of an ambiguous statute"); *id.* at 146-47 (Thomas, J., dissenting).

Stevens' speculations on that point address a case that [was] not before him, are the purest of dicta, and form no part of [*Santos*'s] holding." *Santos*, 128 S. Ct. at 2031 (plurality). Adopting dicta that was rejected by seven Justices—that a single statutory term can be given a different interpretation depending on the facts of a particular case—would contravene both *Clark* and the rule of lenity. Notwithstanding that dicta, the interpretation of the statute adopted by the Court in *Santos* is binding precedent, and governs this case.

For essentially the same reason, the Fifth Circuit's "plain error" rationale cannot insulate its decision from review. Just as this Court did in *Santos*, where the "profits" issue was raised for the first time on collateral review, the Fifth Circuit had no discretion to decline to apply the *Santos* holding to this case. When the Court announces a new interpretation of a statute, as it did in *Santos*, that rule is applicable to "all similar cases pending on direct review." *Griffith*, 479 U.S. 314, 323 (1987). The new rule is applied retroactively "with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328. New substantive rules that narrow the scope of a criminal statute by interpreting its terms "apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' or faces a punishment that the law cannot impose upon him." *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004) (citations omitted).

Such new rules are likewise considered "plain error" noticeable under Fed. R. Crim. P. 52(a), because it is enough that an error be "plain" at the time of appellate consideration. *Johnson* v. *United*

States, 520 U.S. 461, 468 (1997).[15] The holding in *Santos* mandates that the statute be accorded the same interpretation in this case under both *Clark* and the rule of lenity. Under this Court's precedents, the Fifth Circuit had no discretion simply to throw up its hands and declare that the purported "uncertainty" of *Santos* rendered any error not "plain." App. 5a. As Judge DeMoss noted, it was "nonsensical" for the court to refuse to apply *Santos* because of its "uncertainty," *id.*, while at the same not invoke the rule of lenity to construe the term "proceeds" in Bueno's favor. *See id.* 12a-13a (describing Fifth Circuit precedent as erroneous in holding that although "statutory ambiguity favors the accused per the rule of lenity, ambiguity in subsequent case law prevents the convicted from showing plain error"). Nor is the court's decision sheltered from review by proof of "profits" that would make an alternative finding possible, because the Government conceded that it did not present any such evidence. Gov't 5th Cir. Br. 19.

The interpretation of a criminal statute should not vary from case to case depending on the facts. And that interpretation surely should not vary depending

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[15] Moreover, and in any event, the government waived reliance on the plain error standard below by affirmatively *agreeing* in its appellate brief that *de novo* review of the statutory issue was required. *See infra* note 5. Contrary to the Fifth Circuit's holding, that waiver cannot be excused simply because it affects a standard of review. Arguments that an issue has been waived because it was not presented below are themselves subject to waiver if not presented on appeal. *See Estelle* v. *Smith*, 451 U.S. 454, 468 n.12 (1981). The plain-error standard is simply an argument that an issue was not presented below, and it, too, is therefore subject to waiver. *See, e.g., Menesses*, 962 F.2d at 426.

solely on the place where a prosecution happens to be brought. The Court should grant certiorari to ensure its precedents are followed and to bring certainty to the law by resolving the conflict between the circuits.

III. THIS CASE PRESENTS A QUESTION OF NATIONAL IMPORTANCE.

The Court established a simple and consistent interpretative rule in *Clark* that dictated how "proceeds" under Section 1956(a)(1) should be defined in all factual contexts after *Santos*. But contrary to expectations, that rule has gone unheeded in the lower courts.[16] Instead, the lower courts have ventured their own interpretations of the statute, some even adopting Justice Stevens' dicta regarding "proceeds" in the drug trafficking context, rather than what the Court *held* in *Santos*. As evidenced in part by the plethora of decisions on the issue after *Santos*, the question presented here affects hundreds—if not thousands—of individuals convicted under the money laundering statute whose appeals remain inconsistently and unevenly impacted.

Without consistent application of the *Santos* decision, the lower courts will continue to place defendants "in one camp or the other based on an offense-by-offense inquiry that even the most law abiding, prescient and lawyerly citizen would find

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[16] The plurality opinion states that *Clark* requires the consistent application of the Court's holding in *Santos*, and if counsel sought to convince a court to interpret "proceeds" otherwise than as "profits," they would have to argue—and a court would need to find—that *Clark* should be overruled. *See Santos*, 128 S. Ct. at 2031 ("as this particular statute is concerned, counsel remain free to argue Justice STEVENS' view (and to explain why it does not overrule *Clark* v. *Martinez* * * *").

hard to predict." *Kratt*, 579 F.3d at 563. As the Sixth Circuit has explained, the effort to define "proceeds" for the more than 250 predicate offenses to which the money laundering statute applies, *see* 18 U.S.C. § 1956(c)(7), 1957(f)(3), is likely to create "a regime that may generate a cottage industry of *Santos* litigation for years to come." *Kratt*, 579 F.3d at 563. And, "it will create a more severe notice/rule of lenity problem than the one that predated *Santos*." *Id.* As a result of the lower courts' inability to consistently apply the statute the "rule of lenity considerations that drove *Santos* have greater force today than they did before the Court decided *Santos*." *Id.* The Court should avoid this intolerable result by ensuring that the statute is interpreted consistently across the nation.

The Court should not be deterred from granting certiorari due to Congress's amendment of the statute. "Acts of Congress are generally to be applied uniformly throughout the country from the date of their effectiveness onward." *United States* v. *Estate of Donnelly*, 397 U.S. 286, 294 (1970). Certiorari is therefore warranted to ensure that "proceeds" under Section 1956(a)(1) is defined the same way to all defendants from the time it became effective in 1986 until the time Congress amended it in 2009. Beyond the obvious constitutional prohibitions in applying the amended statute to prior conduct, *see supra* note 2, the Court should not permit the amendment to cast a dark shadow over all defendants whose pending cases, or potential collateral review opportunities, are governed by the pre-amendment statute. The large number of post-*Santos* cases, many of which are discussed above,

shows that the issue remains an important one that affects a significant number of cases.[17]

Even on an issue that did not affect the liberty interests of incarcerated defendants, the Court has granted certiorari to resolve a conflict over statutory construction despite Congress's amendment of the statute. In *Watson* v. *Comm'r*, 345 U.S. 544, 547 (1953), the Court granted certiorari despite amendment of a tax statute, because the conflict affected "many sales" made prior to the statute's amendment. Here, it is not merely the tax consequences of sales that are at stake, it is whether Bueno and others will remain in prison, or be free. By granting certiorari here, the Court will avert not a hypothetical, but an actual "startling result" whereby criminal defendants convicted of similar or identical crimes find opposite outcomes. *See Danforth* v. *Minnesota*, 552 U.S. 264, 292 (2008) (Roberts, C. J., dissenting) (noting "startling result" of majority's decision where "[o]f two criminal

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[17] The government has previously stated that the issue faced in *Santos* was of "[r]ecurring [i]mportance." Pet. for Cert. 26, *United States* v. *Santos*, No. 06-1005. In 2006, the year Bueno was tried, there were 896 sentences nationally for the primary offense of money laundering. U.S. Sentencing Commission, Statistical Information Packet, Final Quarterly Data Report, Fiscal Year 2006, Table 3 (2006). In Fiscal Year 2007, there were 903 and in Fiscal Year 2008, there were another 880 sentences with money laundering as the primary offenses. *See* U.S. Sentencing Commission, Final Quarterly Data Report, Fiscal Year 2007 (Table 3), Fiscal Year 2008 (Table 3) (http://www.ussc.gov/linktojp.htm). While not all of these convictions were prosecuted under 18 U.S.C. 1956(a)(1), if only a fraction were, that would still represent a significant number of other individuals who, like Bueno, may have available remedies on direct or collateral review that would be affected by an interpretation of the statute in this case.

defendants, each of whom committed the same crime * * * one may be executed while the other is set free" as a result of the states' inconsistent application of federal retroactivity rules).

The Court's decision will affect persons like Bueno who are still seeking direct review based on the Court's own precedent. *See Griffith*, 479 U.S. at 323 ("we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final"). But it will also affect many others who may still pursue collateral review of their convictions because *Santos* announced a new and substantive "watershed" rule that "was not *dictated* by precedent existing at the time the defendant's conviction became final," *Whorton* v. *Bockting*, 549 U.S. 406, 418 (2007) (citations omitted), and that implicates "the fundamental fairness and accuracy of the criminal proceeding." *Schriro*, 542 U.S. at 351. Indeed, *Santos* itself was a collateral attack on convictions under 28 U.S.C. § 2255, based on an intervening decision of the Seventh Circuit that was applied retroactively to vacate a decade-old conviction. *United States* v. *Santos*, 342 F. Supp. 2d 781, 787 (N.D. Ind. 2004) (citing *Schriro*, 542 U.S. at 351).

The impact of the lower courts' failure to apply *Santos* consistently extends far beyond the context of the specific statute at issue. The error of the lower courts is the same one faced and corrected in *Clark*—the failure to follow this Court's precedents by interpreting the same statutory language the same way regardless of the facts of a particular case. That error reaches far more broadly than the statutory context of this case. In numerous other contexts, circuit courts have applied *Clark* to reject inconsistent interpretations of statutes. *See, e.g.*,

Fernandez v. *Mukasey*, 544 F.3d 862, 868 (7th Cir. 2008) (whether in immigration or sentencing context, "[o]ur interpretation of the same statutes should be consistent, regardless of the context"); *Nadarajah* v. *Gonzales*, 443 F.3d 1069, 1078 (9th Cir. 2006) (rejecting government's interpretation of statute). But the lower courts have failed to do so with respect to the money laundering statute, necessitating this Court's grant of certiorari to restore consistency.

Moreover, *Santos* has broader significance and implications for the lenity doctrine that must not be skewed by the lower courts' conflicting decisions. While many assumed that modern courts had "rendered the rule of lenity largely impotent," *see The New Rule of Lenity*, 119 Harv. L. Rev. 2420 (2006), the *Santos* decision offered fresh reconsideration of that "venerable rule," *Santos*, 128 S. Ct. at 2025, which some suggested began to "level[] the playing field for defendants faced with incredibly powerful enterprise statutes." *The Supreme Court, 2007 Term, Leading Cases: Federal Statutes and Regulations—Money Laundering*, 122 Harv. L. Rev. 475, 483 (2008). It is difficult to know the number of cases in which the Court's use of the rule of lenity in *Santos* has already influenced the reasoning of the lower courts beyond *Santos*' specific application to the money laundering statute, but it is clear that it has. *See, e.g.*, *United States* v. *Williams*, 558 F.3d 166, 173 (2d Cir. 2009) (noting, in interpreting federal firearms statute, that "were we to conclude that there was ambiguity, we would follow the Supreme Court's directive to 'interpret ambiguous criminal statutes in favor of defendants, not prosecutors,' rather than attempt to 'play the part of a mind reader' divining 'Congress's presumptive

intent.'") (citing *Santos*, 128 S. Ct. at 2026, 2028); *Van Don Nguyen* v. *Holder*, 571 F.3d 524, 525-26 (6th Cir. 2009) (applying *Santos* in defining "crime of violence" under 18 U.S.C. § 16(b)). That *Santos* has made such an impact in other areas of law makes it all the more important that the lower courts not be permitted to simply write the rule of lenity out of money laundering cases by failing to follow *Santos*. By doing so, the lower courts are creating unevenness in the application of the rule of lenity.

Where this Court has held that statutory language has a particular meaning, lower courts should not be permitted to ascribe a different meaning to the same language merely because a case arises in a different factual context. As the Court held in *Clark*, and as seven Justices agreed in *Santos*, allowing such a result to stand would subvert the rule of law. The Court should grant certiorari to bring certainty to the law.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

JONATHAN S. FRANKLIN*
MARK EMERY
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-0210

* Counsel of Record *Counsel for Petitioner*

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10451

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

FORTINO COBAIN BUENO,
Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before JOLLY, DeMOSS, and PRADO, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Fortino Cobain Bueno appeals his conviction on one count of conspiracy to commit promotional money laundering in violation of 18 U.S.C. § 1956(h). He challenges the sufficiency of the evidence on several grounds and further challenges the reasonableness of his sentence. Because we find no ground for reversal

of either conviction or the sentence, we affirm the district court's judgment.

I.

On March 22, 2006, Investigator Billy Joe Sides stopped Bueno for speeding on Interstate 20 in Mitchell County, Texas. Circumstances led Sides to conclude that Bueno was involved in the "drug courier business," and when United States Court of Appeals. Bueno allowed Sides to search his car, the officer discovered money wrapped in plastic bags and stored in hidden compartments. Bueno then told Sides he was driving the cash to California for $3,000. Sides took Bueno and his car to a sheriff's substation. After a thorough search, Sides discovered more than $130,000 concealed throughout the car. He then conducted a videotaped interview that would be the government's primary evidence at trial. During the interview, Bueno said he traveled from California to a town near Fayetteville, North Carolina. Once there, he registered a car that he did not own using an address where he did not reside. He admitted that he knew he was working with drug traffickers. He said they picked him up when he arrived in North Carolina and gave him money to drive to California. He also admitted to other details of the transaction that the government would contend were typical of trafficking drug proceeds.[1]

At trial, Bueno claimed he was forced to drive the money across the country. He told the jury that when he learned his cargo consisted of drug money, he refused, agreeing only after threats to his life and

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[1] Bueno argues that he does not understand English so the tape should be discounted. He contradicted much of his videotaped statement at trial.

his family's lives. At no point before had he made such a claim.

At the close of evidence, the district court instructed the jury on the elements of conspiracy to commit promotional money laundering. Regarding the requirement that the money be "proceeds" of an illegal activity, it instructed that that the term included "any * * * property that someone acquires or retains as a result of the commission of the underlying specified activity." The court also told the jury that if it believed that Bueno had been coerced, it should acquit him. Bueno did not object to the instructions, but he did object to the sufficiency of the evidence and moved for acquittal. The district court denied his motion, and the jury convicted him.

The court received a presentence report ("PSR") that recommended a sentence of between 87 and 108 months. It contained various enhancements and detailed their basis. Bueno did not object to the PSR, and the judge sentenced him to ninety-four months after hearing argument. Bueno now appeals his conviction and his sentence.

II.

A.

Bueno presents three arguments that the evidence was insufficient to convict him of conspiracy to commit promotional money laundering. We disagree with each.

1.

Bueno first argues that *United States* v. *Santos*, 128 S. Ct. 2020 (2008), requires the government to show that the money he transported constituted profits from illegal drug activity. He makes this

argument for the first time on appeal, so we review the court's ruling on the sufficiency of the evidence for plain error.[2] *United States* v. *Villegas*, 404 F.3d 355, 358 (5th Cir. 2005). We can reverse for plain error only when the trial court (1) commits an error (2) that was plain and (3) affects the defendant's substantial rights. *Id.* If we find those three factors, we will reverse only if "the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 358-59 (quotations omitted).

Santos decided that 18 U.S.C. § 1956(a)(1), which bans laundering the "proceeds" of an unlawful activity, requires the government to show that the laundered money is profit, not simply receipts. 128 S. Ct. at 2025. But *Santos* addressed an illegal lottery operation. *Id.* at 2022. This case involves a conspiracy to launder proceeds of an illegal narcotics operation, a distinction that makes a difference. *Santos* was a splintered decision, with a four-justice plurality headed by Scalia applying the rule of lenity to require showing laundered profits for any violation of Section 1956(a)(1). Justice Stevens, whose vote provided the majority, agreed with the plurality's reading concerning gambling operations, but he thought that "proceeds" included all receipts of drug operations. *Id.* at 2032 (Stevens, J., concurring).

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[2] Bueno argues that we should review the instructions de novo, because the government agreed *de novo* review was appropriate in its brief. We reject this argument. "The parties' failure to brief and argue properly the appropriate standard [of review] may lead the court to choose the wrong standard. But no party can *control* our standard of review." *United States* v. *Vontsteen*, 950 F.2d 1086, 1091 (5th Cir. 1992) (en banc) (emphasis in original).

In any event, it is not for this panel to decide whether the district court committed plain error by failing to require the government to prove the money Bueno transported was profits. In *United States* v. *Fernandez*, the court faced exactly the same issue: whether the district court committed plain error when it did not require the government to show drug profits, as opposed to receipts, in its case alleging promotional money laundering and conspiracy to do the same. 593 F.3d 303, 315-16 (5th Cir. 2009). After examining the *Santos* opinions, the court concluded, "While Justice Stevens and the plurality disagreed over the precise precedential effect of his statement, the uncertainty renders any error here not 'plain.' " *Id.* at 316. We must reach the same decision here.[3]

2.

Next, Bueno argues that the evidence of his intent to promote drug trafficking was insufficient. We inquire whether a "reasonable trier of fact could conclude that the elements of the offense were established beyond a reasonable doubt, viewing the evidence in the light most favorable to the verdict and drawing all reasonable inferences from the evidence to support the verdict." *United States* v.

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[3] Judge DeMoss suggests that the *Fernandez* court's subsequent consideration of what effect any error would have had on Fernandez's substantial rights indicates that the court may not have been convinced that there was no plain error. Assuming he is correct, the court at most offered an alternative holding, a conclusion compelled by its decision to start the substantial rights analysis with "Even were there error that was plain * * * ." *Id.* (emphasis added). "This circuit follows the rule that alternative holdings are binding precedent and not obiter dicta." *Pruitt* v. *Levi Strauss & Co.*, 932 F.2d 458, 464 (5th Cir. 1991).

Percel, 553 F.3d 903, 910 (5th Cir. 2008) (quotations omitted).

The government presented evidence that Bueno knew he was working with drug traffickers and that he falsely registered two cars that were not his, along with other evidence. This evidence was sufficient to support his conviction.

3.

Bueno finally objects that the jury had insufficient evidence that Bueno joined a conspiracy. A conviction for conspiracy to launder money in violation of 18 U.S.C. § 1956(h) requires proof that "(1) there was an agreement between two or more persons to launder money; (2) the defendant voluntarily agreed to join the conspiracy; and (3) one of the persons committed an overt act in furtherance of the conspiracy." *United States* v. *Armstrong*, 550 F.3d 382, 403 (5th Cir. 2008). Bueno essentially asks us to believe his story that he was coerced into driving the money instead of the government's version that he was a voluntary participant. Weighing the evidence is a job for the jury, not for us. *West* v. *Nabors Drilling USA, Inc.*, 330 F.3d 379, 384 (5th Cir. 2003).

B.

Bueno also argues that the district court failed to make adequate findings to support various sentencing enhancements. Because he raises this argument for the first time on appeal, we review for plain error. *Percel*, 553 F.3d at 909.

The PSR detailed the enhancements and their basis, and the district court adopted the PSR without any objection from Bueno. Because "information in the [PSR] is presumed reliable and may be adopted

by the district court without further inquiry," the district court did not need to make any further findings or conduct further investigation. *United States* v. *Carbajal*, 290 F.3d 277, 287 (5th Cir. 2002).

III.

Accordingly, the judgment of the district court is

AFFIRMED.

DeMOSS, Circuit Judge, Specially Concurring:

In *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008), the Supreme Court held that in a prosecution for promotional money laundering under 18 U.S.C. § 1956(a)(1), the government must prove that the "proceeds" involved were the "profits" of unlawful activity. In this case, we must determine if Fortino Cobain Bueno is criminally liable under a one-count indictment for conspiracy to commit § 1956(a)(1), where he was apprehended while transporting over $130,000 of drug-derived funds cross-country, but there was no evidence that the cash was profits of a controlled-substances enterprise, nor evidence that Bueno knew the cash was profits. Our precedent and the plain-error rule oblige us to answer this question in the affirmative. For this reason, I concur in the panel's disposition of this appeal. However, I write separately to lodge my concern that our Circuit has misapplied Supreme Court precedent at arriving at this state of affairs. I think the better course would be to reverse and remand for a new trial to determine whether the money hidden in Bueno's car was profits, as opposed to gross receipts, of drug-related activities.

I.

Bueno is a gardener from California. Driving a Honda Accord cross-country, he was stopped for speeding in Mitchell County, Texas. He consented to a search of the car; this revealed bundles of cash hidden in the car's panels.

During a videotaped interview with police, Bueno, who is illiterate and does not speak English well, waived his Miranda rights. He said he went to North Carolina to buy used cars, and while staying at a house in the town of Hope Mills, he was instructed to drive the Honda and hidden cash from North Carolina to California. Bueno was paid around $2000. He insisted that he did not want to drive the money to California, but feared that his family would be harmed if he did not. Bueno knew little about the men who gave him this task.

However, he inferred that his cargo was "drug money." Bueno's statements to law enforcement formed the bulk of the government's case against him. The government did not present additional evidence about the nature of the alleged drug trafficking operation, the origin of the cash, or Bueno's knowledge of whether the funds were gross receipts or profits.

The district court instructed the jury that, for purposes of § 1956(a)(1), "proceeds" means "property that someone acquires or retains as a result of the commission of the underlying specified unlawful activity."[1] Bueno did not object to this instruction, and the jury found him guilty. Bueno also filed a motion for acquittal under FED. R. CRIM. P. 29, on the

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[1] I can find no language in the money laundering statute from which this definition would have been drawn.

basis that the evidence did not establish the essential elements of the offense. Bueno did not have the clairvoyance to argue in his Rule 29 motion that the government failed to prove the money was the profits of a drug operation, as opposed to gross receipts, because the *Santos* decision had not then been handed down. The court denied the motion, and Bueno appealed.

II.

Bueno's strongest arguments arise under *Santos*, which was decided after Bueno's trial, but before briefing in this appeal.[2] Bueno argues that in light of *Santos*, the evidence presented against him at trial is insufficient to support a conviction for money laundering. Nevertheless, owing to Bueno's failure to anticipate and raise *Santos*-based arguments before the district court, we review only for plain error. FED. R. CRIM. P. 52(b); *Johnson* v. *United States*, 520 U.S. 461, 466 (1997); *United States* v. *Rios-Quintero*, 204 F.3d 214, 215 (5th Cir. 2000). Bueno must show (1) error, (2) that is plain, and (3) that affected his substantial rights. *Johnson*, 520 U.S. at 466-67. If these conditions are met, we may exercise our discretion to correct the error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 467. To determine whether an error is plain, we examine the state of the law at the time of appeal. *See id.* at 468; *see also Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987) ("[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final, with

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[2] I fully concur in the panel's reasoning regarding Bueno's other arguments.

no exception for cases in which the new rule constitutes a 'clear break' with the past."). This rule is particularly salient to Bueno's case, because *Santos* is a watershed change of law by the Supreme Court.

A.

In *Santos*, the Supreme Court held that the term "proceeds" in 18 U.S.C. § 1956(a)(1) is ambiguous, because it can either mean gross receipts or profits. 128 S. Ct. at 2025. The Court invoked the rule of lenity and held that the more restrictive, defendant-friendly definition applies, *i.e.*, profits. *Id.* Consequently, the Court vacated petitioner Santos's conviction, which Santos had collaterally attacked via a habeas corpus petition under 28 U.S.C. § 2255. *Id.* at 2023.

While the Court's disposition is easily summarized, its vote was fractured, giving lower courts scant guidance for future applications. Justice Scalia, joined by Justices Souter, Thomas, and Ginsburg, believed that the government must prove in any promotional money laundering prosecution (1) that the defendant conducted a transaction with "profits," and (2) that the defendant knew the transaction involved profits of unlawful activity. *Id.* at 2029. Justice Scalia emphasized that the same statutory term must be given the same meaning in all cases; the definition of the term cannot bend according to the facts presented. *Id.* at 2030 (citing *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005)).[3] Justice Stevens reasoned that the government need only

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[3] Justice Thomas did not join the portion of the plurality opinion which discussed *stare decisis* and Justice Stevens's opinion.

prove the more prosecution-friendly "gross receipts" definition if legislative history showed congressional intent to cover such laundering activity, specifically in the controlled substances context. *Id.* at 2031-32 & n.3. Justice Alito, joined by Chief Justice Roberts and Justices Kennedy and Breyer, would have held that "proceeds" is unambiguous and means "gross receipts" for all prosecutions under § 1956(a)(1). *Id.* at 2036.

B.

In the aftermath of *Santos*, this Court has struggled to define "proceeds" in money laundering prosecutions where the underlying unlawful conduct is a controlled substances offense. *See United States* v. *Fernandez*, 559 F.3d 303, 316-17 (5th Cir. 2009); *United States* v. *Brown*, 553 F.3d 768, 783-84 (5th Cir. 2008), *cert. denied sub nom. Combs* v. *United States*, 129 S. Ct. 2812 (2009), *sub nom. Brown* v. *United States*, --- S. Ct. ---, No. 09-5316 (Oct. 5, 2009).[4] The *Brown* panel reasoned that while Justice Stevens and the four dissenters might apply the "gross receipts" definition in the controlled substances context, it is also possible that one of the dissenting justices would join the *Santos* plurality so as to achieve a consistent definition of "proceeds" for all prosecutions under § 1956(a)(1). 553 F.3d at 784.

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[4] Congress has since amended the statute. Effective May 20, 2009, § 1956(c)(9) now reads: "the term 'proceeds' means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity." Fraud Enforcement and Recovery Act of 2009, Pub. L. 111-21, § 2(f)(1)(B), 123 Stat. 1617, 1618 (2009). The bill is silent on retroactivity; therefore, it only applies to conduct which occurs post-amendment. *See Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994).

In *Brown*, the panel did not need to decide which definition applies because the government presented "ample, unchallenged evidence" that the defendants' illicit sales of painkillers were profitable. *Id.*

Moreover, "[m]uch of the profits from these sales was deposited into pharmacy bank accounts in cash, accounts from which the money used in the charged transactions was drawn." *Id.* As for erroneous jury instructions (which reflected the law pre-*Santos*), the *Brown* opinion further commented that the defendants' failure to object, coupled with the unsettled state of the law post-*Santos*, meant that the defendants could not meet the plain-error standard. *Id.* at 785.

In *Fernandez*, another panel of this Court took a similar view of the "plainness" of the error of failing to present evidence or give a jury instruction which conforms to the definition of "proceeds" under *Santos*:

> Justice Stevens's comment that gross revenues were the relevant proceeds applies to the sale of contraband and the operation of criminal organizations, precisely the type of offenses for which Fernandez was convicted. While Justice Stevens and the plurality disagreed over the precise precedential effect of his statement, the uncertainty renders any error here not "plain."

559 F.3d at 316. In other words, the Supreme Court gave an ambiguous interpretation to an ambiguous statute. Thus, *Fernandez* stands for that proposition that, while statutory ambiguity favors the accused per the rule of lenity, ambiguity in subsequent case

law prevents the convicted from showing plain error. I find this nonsensical.

The panel in *Fernandez*, perhaps unconvinced that the error was not plain, also reasoned that *Fernandez*'s substantial rights were unaffected. *Fernandez* was convicted of § 1956(a)(1)(B)(i) and (ii), "which prohibit transactions designed to 'conceal or disguise' the origins or location of the proceeds of illegal activity, or to avoid legal reporting requirements." *Id.* at 317. Like Bueno, Santos was convicted of § 1956(a)(1)(A)(i), which "prohibits conducting a financial transaction with the proceeds of illegal activity 'with the intent to promote the carrying on of' additional illegal activity." *Id.* at 316. Thus, Fernandez was convicted of a different subsection of the money laundering statute. Moreover, the government presented evidence that Fernandez used laundered funds to purchase assets unrelated to the controlled substances activity in "a string of transactions over a period of fifteen years involving real estate, horses, and multiple shell corporations." *Id.* at 317. *A fortiori*, such funds were inferentially profits of the drug trafficking conspiracy.

C.

I disagree with the narrow reading our Court has given *Santos* in the controlled substances context in *Brown* and *Fernandez*. I also believe that this case is factually distinguishable from *Brown* and *Fernandez*, and that under my reading of *Santos*, Bueno can show plain error. I recognize that, arguably, *Brown* and *Fernandez* can be interpreted to control our decision in this case. Nevertheless, I will explain my reasoning herein.

In my mind, *Santos* brought about a substantial change in the meaning of the federal money laundering statute. It seems to me that *Santos* stands for the proposition that the term "proceeds" in § 1956 is ambiguous. Therefore, our interpretation must be guided by the rule of lenity in all money laundering prosecutions. As Justice Scalia said, *Santos* did not settle the *stare decisis* question one way or another. *Id.* at 2031 ("'[P]roceeds' means 'profits' when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist."). I do not see it fit to count Supreme Court votes in a theoretical money laundering case where the underlying offense is a controlled substances violation. In light of the uncertainty reigning post-*Santos*, I would grant Bueno the benefit of a very considerable doubt, and hold that the rule of lenity obliges us to define "proceeds" as "profits" in this case. There is evidence that the cash was drug money—Bueno's statements and admissions establish this beyond peradventure. However, there is no evidence whatsoever that the money was profits, nor that Bueno, a low-level bagman, knew that the money represented drug-trafficking profits. Bueno was apparently kept in the dark about the nature of the organization he served and the funds he delivered; he was only told that he was to drive over $130,000 from point A (North Carolina) to point B (California).

We judge error at the time of appeal. *See Johnson*, 520 U.S. at 468. Thus, I would hold that the district court erred in failing to instruct the jury that "proceeds" means "profits," as opposed to property derived from criminal activity (*i.e.*, gross receipts).

Given the absence of evidence of profits, or Bueno's knowledge thereof, the court likewise erred in failing to grant Bueno's motion for judgment of acquittal. The difference between "profits" and "gross receipts" is obvious; these errors were plain. I recognize that this conclusion arguably conflicts with *Brown* and *Fernandez*. *See* 553 F.3d at 785; 559 F.3d at 316. Our rule of orderliness prevents this panel from overruling a prior decision; therefore, I reluctantly concur in the panel's result. *See United States* v. *Dial*, 542 F.3d 1059, 1060 (5th Cir. 2008).

In my view, the error affected Bueno's substantial rights. As discussed above, there is simply no evidence that the money in Bueno's car was profits, as opposed to gross receipts. This sets this case apart factually from either *Brown* or *Fernandez*; in both of those cases, the government presented extensive evidence of the profitability of the respective controlled-substances activities.

Finally, I believe that we should exercise our discretion to correct the error, because it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *See Johnson*, 520 U.S. at 467. It bears emphasizing that the gulf between the elements of § 1956(a)(1) and the proof adduced at trial is vast. Moreover, the Supreme Court saw it fit in *Santos* to vacate on collateral review a conviction which had been final for nearly a decade.[5] *See* 128 S.

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[5] Santos's conviction was affirmed on direct appeal to the Seventh Circuit; the Supreme Court then denied his petition for a writ of certiorari. A subsequent Seventh Circuit decision held that "proceeds" under § 1956 actually means "profits." *See United States* v. *Scialabba*, 282 F.3d 475, 477-78 (7th Cir. 2002). *Scialabba* was a money laundering conviction where the underlying offense was running an unlawful gambling business, but its reasoning applies to drug-related activities as well:

Ct. at 2023. It stands to reason that if the Supreme Court saw it fit to apply the rule of lenity and to vacate Santos's long-final conviction, we should not hesitate to grant relief on direct appeal. If I could, I would vacate the conviction and remand to the district court for retrial.

"Likewise, one would suppose, the 'proceeds' of drug dealing are the profits of that activity (the sums available for investment outside drug markets), the net yield rather than the gross receipts that must be used to buy inventory and pay the wages of couriers." *Id.* at 477. Santos sought to set aside his conviction via a writ of habeas corpus under 28 U.S.C. § 2255. The district court granted relief and the Seventh Circuit affirmed, as did the Supreme Court. *See* 128 S. Ct. at 2023.

APPENDIX B

UNITED STATES DISTRICT COURT
Northern District of Texas

UNITED STATES OF AMERICA	
v.	Case Number 1:06-CR-022(01) RAJ
FORTINO COBAIN BUENO	USM Number 34288-177
Defendant.	

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, FORTINO COBAIN BUENO, was represented by Sidney A. Lyle.

The defendant was found guilty on Count(s) 1 by a jury verdict on September 29, 2006 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such Count(s), involving the following offense(s):

Title & Section	Nature of Offense	Offense Ended	Count(s)
18 U.S.C. § 1956(h)	Money Laundering Conspiracy	March 22, 2006	1

As pronounced on January 5, 2007, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid. If ordered to pay restitution, the defendant shall notify the Court and United States Attorney of any material change in the defendant's economic circumstances.

Signed this the 8 day of January, 2007.

Robert Junell

Robert Junell
U.S. District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 94 months.

The Court makes the following recommendations to the Bureau of Prisons:

That the defendant serve this sentence as close to Cathedral City, California as possible.

That the defendant participate in the Bureau of Prisons Inmate Education Program while incarcerated.

That the defendant participate in the Bureau of Prisons Job Training Program while incarcerated.

That the defendant participate in an alcohol treatment and abuse program while incarcerated.

The defendant shall remain in custody pending service of sentence.

RETURN

I have executed this Judgment as follows:

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this Judgment

United States Marshall

By _____

Deputy Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of Three (3) years.

While on supervised release, the defendant shall comply with the mandatory, standard, and if applicable, the special conditions that have been adopted by this Court as set forth on pages 4 and 5 of this judgment; and shall comply with the following additional conditions:

_X_ The defendant shall not possess a firearm as as defined in 18 USC § 921, and the defendant shall not be permitted to reside any place where firearms are possessed or stored.

_X_ The defendant shall abstain from the use of alcohol and/or all other intoxicants during the term of supervision. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the U.S. Probation Officer.

_X_ The defendant shall not be permitted to reside or travel in the State of Texas without permission from the supervising officer during the term of supervision.

CONDITIONS OF SUPERVISION

Mandatory Conditions:

1) The defendant shall not commit another federal, state. or local crime.

2) The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

3) In supervised release cases only, the defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from custody of the Bureau of Prisons.

4) If convicted of a felony, the defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.

5) The defendant shall cooperate in the collection of DNA as directed by the probation officer if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. § 1413a).

6) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), the defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer.

7) If convicted of a domestic violence crime as defined in 18 U.S.C. § 3561(b), the defendant shall participate in an approved program for domestic violence.

8) If the judgment imposes a fine or restitution, it is a condition of supervision that the defendant pay in accordance with the Schedule of Payments sheet of the judgment.

Standard Conditions:

1) The defendant shall not leave the judicial district without permission of the court or probation officer.

2) The defendant shall report to the Probation Officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquires by the Probation Officer and follow the instructions of the Probation Officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the Probation Officer for schooling, training or other acceptable reasons.

6) The defendant shall notify the Probation Officer at least ten days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substance, except as prescribed by a physician.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the Probation Officer.

10) The defendant shall permit a Probation Officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the Probation Officer.

11) The defendant shall notify the Probation Officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the Court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and

to confirm the defendant's compliance with such notification requirement.

14) If convicted of a sexual offense as described in 18 U.S.C. § 4042(c)(4), or has a prior conviction of a State or local offense that would have been an offense as described in 18 U.S.C. § 4042 (c)(4) if a circumstance giving rise to Federal jurisdiction had existed. the defendant shall participate in a sex offender treatment program approved by the probation officer. The defendant shall abide by all program rules, requirements and conditions of the sex offender treatment program, including submission to polygraph testing, to determine if the defendant is in compliance with the conditions of release. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based on the defendant's ability to pay.

15) The defendant shall submit to an evaluation for substance abuse or dependency treatment as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a program approved by the probation officer for treatment of narcotic addiction or drug or alcohol dependency which may include testing and examination to determine if the defendant has reverted to the use of drugs or alcohol. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

16) The defendant shall submit to an evaluation for mental health counseling as directed by the probation officer, and if deemed necessary by the probation officer, the defendant shall participate in a mental health program approved by the probation officer. The defendant may be required to contribute to the cost of the services rendered (copayment) in an amount to be determined by the probation officer, based upon the defendant's ability to pay.

17) If the defendant is excluded, deported, or removed upon release from imprisonment, the term of supervised release shall be a non-reporting term of supervised release. The defendant shall not illegally re-enter the United States. If the defendant lawfully re-enters the United States during the term of supervised release, the defendant shall immediately report in person to the nearest U.S. Probation Office.

18) If the judgment imposes other criminal monetary penalties, it is a condition of supervision that the defendant pay such penalties in accordance with the Schedule of Payments sheet of the judgment.

19) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall provide the probation officer access to any requested financial information.

20) If the judgment imposes a fine, special assessment, restitution, or other criminal monetary penalties, it is a condition of supervision that the defendant shall not incur any new credit charges or open additional lines of credit without the approval

of the probation officer unless the defendant is in compliance with the payment schedule.
The Court further adopts such of the following special conditions applied to the supervised person by the judge at the time of sentencing:

1) COMMUNITY CONFINEMENT: The defendant shall reside in a Community Corrections center for a period of ___ months to commence on ___. Further, once employed. the defendant shall pay 25% of his/her weekly gross income for his/her subsistence as long as that amount does not exceed the daily contract rate.

2) HOME DETENTION: The defendant shall participate in the Home Confinement Program for a period of ___ days/months. During this time the defendant shall remain at his/her place of residence except for employment and other activities approved in advance by the probation officer. The defendant shall maintain a telephone at his/her place of residence without "call forwarding," a "modem," "caller ID," "call waiting," or portable cordless telephones for the above period. At the direction of the probation officer, the defendant shall wear an electronic monitoring device and follow electronic monitoring procedures specified by the probation officer. The court further orders that the defendant shall pay for the costs of Home Confinement, as directed by the probation officer.

3) COMMUNITY SERVICE: The defendant shall perform ___ hours of community service work without pay, at a location approved by the probation officer, at a minimum rate of four hours per week, to

be completed during the first ___ months of supervision.

CRIMINAL MONETARY PENALTIES/SCHEDULE

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth. Unless the Court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. Criminal Monetary Penalties, except those payments made through Federal Bureau of Prisons' Inmate Financial Responsibility Program shall be paid through the Clerk. United States District Court, 200 W. 8th Street, Room 130 Austin, Texas 78701.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

	Assessment	Fine	Restitution
TOTAL:	$100.00	$0	$0

Special Assessment

It is ordered that the defendant shall pay to the United States a special assessment of $100.00. Payment of this sum shall begin immediately.

Fine

The fine is waived because of the defendant's inability to pay.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned

payment, unless specified otherwise in the priority order or percentage payment column above. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. *See* 18 U.S.C. § 3614.

The defendant shall pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All payment options may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

Payments shall be applied in the following order: (1) assessment. (2) restitution principal. (3) restitution interest, (4) fine principal. (5) community restitution. (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Findings for the total amount of losses are required under Chapters 109A. 110, 110A, and 113A of Title 18 for offenses committed on or after September 13. 1994, but before April 23. 1996.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10451

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

FORTINO COBAIN BUENO,
Defendant- Appellant

U.S. COURT OF APPEALS
FILED
Dec 9, 2009
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court for the Northern District of Texas, Abilene

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ON PETITION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., _____, _____F.3d _____)

Before JOLLY, DeMOSS, and PRADO, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor

judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

E. Grady Jolly_____
United States Circuit Judge

REHG6A

APPENDIX D

18 U.S.C. § 1956 (2006)

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity--

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States--

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part--

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent--

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Penalties.--

(1) In general.--Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or section 1957, or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of--

(A) the value of the property, funds, or monetary instruments involved in the transaction; or

(B) $10,000.

(2) Jurisdiction over foreign persons.--For purposes of adjudicating an action filed or enforcing a penalty ordered under this section, the district courts shall have jurisdiction over any foreign person, including any financial institution authorized under the laws of a foreign country, against whom the action is brought, if service of process upon the foreign person is made under the Federal Rules of Civil Procedure

or the laws of the country in which the foreign person is found, and--

(A) the foreign person commits an offense under subsection (a) involving a financial transaction that occurs in whole or in part in the United States;

(B) the foreign person converts, to his or her own use, property in which the United States has an ownership interest by virtue of the entry of an order of forfeiture by a court of the United States; or

(C) the foreign person is a financial institution that maintains a bank account at a financial institution in the United States.

(3) Court authority over assets.--A court described in paragraph (2) may issue a pretrial restraining order or take any other action necessary to ensure that any bank account or other property held by the defendant in the United States is available to satisfy a judgment under this section.

(4) Federal receiver.--

(A) In general.--A court described in paragraph (2) may appoint a Federal Receiver, in accordance with subparagraph (B) of this paragraph, to collect, marshal, and take custody, control, and possession of all assets of the defendant, wherever located, to satisfy a civil judgment under this subsection, a forfeiture judgment under section 981 or 982, or a criminal sentence under section 1957 or subsection (a) of this section, including an order of restitution to any victim of a specified unlawful activity.

(B) Appointment and authority.--A Federal Receiver described in subparagraph (A)--

(i) may be appointed upon application of a Federal prosecutor or a Federal or State regulator, by the

court having jurisdiction over the defendant in the case;

(ii) shall be an officer of the court, and the powers of the Federal Receiver shall include the powers set out in section 754 of title 28, United States Code; and

(iii) shall have standing equivalent to that of a Federal prosecutor for the purpose of submitting requests to obtain information regarding the assets of the defendant--

(I) from the Financial Crimes Enforcement Network of the Department of the Treasury; or

(II) from a foreign country pursuant to a mutual legal assistance treaty, multilateral agreement, or other arrangement for international law enforcement assistance, provided that such requests are in accordance with the policies and procedures of the Attorney General.

(c) As used in this section--

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other

disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" includes--

(A) any financial institution, as defined in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder; and

(B) any foreign bank, as defined in section 1 of the International Banking Act of 1978 (12 U.S.C. 3101);

(7) the term "specified unlawful activity" means--

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is

indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, destruction of property by means of explosive or fire, or a crime of violence (as defined in section 16);

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978));

(iv) bribery of a public official, or the misappropriation, theft, or embezzlement of public funds by or for the benefit of a public official;

(v) smuggling or export control violations involving-

(I) an item controlled on the United States Munitions List established under section 38 of the Arms Export Control Act (22 U.S.C. 2778); or

(II) an item controlled under regulations under the Export Administration Regulations (15 C.F.R. Parts 730-774);

(vi) an offense with respect to which the United States would be obligated by a multilateral treaty, either to extradite the alleged offender or to submit the case for prosecution, if the offender were found within the territory of the United States; or

(vii) trafficking in persons, selling or buying of children, sexual exploitation of children, or

transporting, recruiting or harboring a person, including a child, for commercial sex acts;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 175c (relating to the variola virus), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 541 (relating to goods falsely classified), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section 658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or

fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 922(1) (relating to the unlawful importation of firearms), section 924(n) (relating to firearms trafficking), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), section 1030 (relating to computer fraud and abuse), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnaping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 2113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating

to international terrorist acts transcending national boundaries), section 2332g (relating to missile systems designed to destroy aircraft), section 2332h (relating to radiological dispersal devices), or section 2339A or 2339B (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 [7 U.S.C.A. § 2024] (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, any violation of section 543(a)(1) of the Housing Act of 1949 [42 U.S.C.A. § 1490s(a)(1)] (relating to equity skimming), any felony violation of the Foreign Agents Registration Act of 1938, any felony violation of the Foreign Corrupt Practices Act, or section 92 of the Atomic Energy Act of 1954 (42 U.S.C. 2122) (relating to prohibitions governing atomic weapons).

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et

seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.); or

(F) any act or activity constituting an offense involving a Federal health care offense;

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if--

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.--If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

(i) Venue.--(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in--

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.